II. THE REQUIREMENT OF SECRECY -- RULE 6(e)

A. Rule 6(e)

The general secrecy requirements of Rule 6(e) are contained in Section 6(e)(2). It provides that:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

1. Purpose of Rule 6(e)

Rule 6(e) codifies the traditional rule of grand jury secrecy by prohibiting members of the grand jury, Government attorneys and their authorized assistants, and other grand jury personnel from disclosing matters occurring

before the grand jury, except as otherwise authorized by the rule. Grand jury secrecy is vital to the investigative function of the grand jury. It serves several distinct interests, primarily: (1) to encourage witnesses to come forward and testify freely and honestly; (2) to

minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations; (3) to safeguard the grand jurors themselves and the proceedings from extraneous pressures and influences; and (4) to protect accused persons who are ultimately exonerated from unfavorable publicity.1/

In addition, the secrecy requirements of Rule 6(e) and the limited exceptions promote three other policy concerns: (1) the Government's need to know what transpires before the grand jury to prosecute cases effectively and to assist the grand jury in its deliberations; (2) the need to protect the grand jury process from prosecutorial abuse; and (3) the need for Government attorneys to adhere to established procedures that limit the Government's powers of discovery and investigation.2/

The reasons for grand jury secrecy are particularly compelling while an investigation is pending. While these reasons may lose some of their force after the proceedings have been concluded, grand jury secrecy may

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1/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); United States v. Jones, 766 F.2d 994 (6th Cir.), cert. denied,

474 U.S. 1006 (1985); In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 843 (9th Cir. 1985); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983).

2/ See United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

never be breached, except as provided for by the rule, no matter how compelling the circumstances.3/

2. Obligation on grand jurors

Grand jurors are subject to the secrecy requirement of Rule 6(e). The court generally provides each grand juror with a copy of the Federal Grand Jury Handbook that includes an explanation of Rule 6(e)'s obligation of secrecy. In addition, each grand juror's obligation of secrecy usually is emphasized in the oath each juror takes and in the charge given to the grand jury by the judge. A frequently used practice of Division attorneys is to reiterate the requirements of Rule 6(e) in the opening statement to the grand jury and at appropriate times during subsequent grand jury sessions.

The grand jurors may disclose matters occurring before them, except for their deliberations, to the attorneys representing the Government for use in the performance of their duties or to others when ordered to do so by the court. A grand juror obviously may discuss matters occurring before the grand jury with other grand jurors, but should do so only in the grand jury room.

3/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); In re Bonanno, 344 F.2d 830 (2d Cir. 1965); In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501 (5th Cir. 1980); United States v. Fischbach and Moore, Inc., 776 F.2d at 844; In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983). But see In re Biaggi, 478 F.2d 489 (2d Cir. 1973) (court may disclose grand jury information if there is a sufficient public interest).

3. Obligation on reporter

The reporter who takes and transcribes the evidence is permitted to be present during grand jury sessions, except when the grand jury is deliberating or voting. Rule 6(e) specifically imposes an obligation of secrecy on the reporter. Further, the rule explicitly recognizes that the reporter may utilize other persons as typists to transcribe the recorded testimony by including such typists among those who are prohibited from making disclosures. Transcription of grand jury evidence should be performed entirely on the premises of the grand jury reporter. Independent transcription centers should not be used because of the potential for a breach of grand jury secrecy.4/

4. Obligation on Government attorneys and support staff

Government attorneys and support staff are prohibited from disclosing matters occurring before a grand jury,

subject to several important exceptions that are discussed in detail elsewhere in this chapter.

4/ See Memorandum from Stephen S. Trott, Assistant Attorney General, Criminal Division, to all United States Attorneys, Jan. 10, 1984.

5. No obligation on witness

Rule 6(e) specifically prohibits any obligation of secrecy from being "imposed on any person except in accordance with this rule." Therefore, witnesses cannot be put under any obligation of secrecy and attempts to impose such an obligation generally have been struck down by the courts.5/ One circuit permits the imposition of a reasonable obligation of secrecy on a witness if there is a compelling necessity that is shown with particularity.6/ The grand jury foreman or a Government attorney may request a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.7/ When making such a request, it should be absolutely clear that it is a request only and that no expressed or implied coercion is used.

5/ See In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976); In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987); Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. Unit B Sept. 1981); United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976), cert. denied, 429 U.S. 820 (1977).

6/ In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676 (8th Cir.), cert. dismissed, 479 U.S. 1013 (1986); see also In re Swearingen Aviation Corp., 486 F. Supp. 9 (D. Md. 1979).

7/ See In re Grand Jury Proceedings, 814 F.2d at 70; In re Castiglione, 587 F. Supp. 1210 (E.D. Cal. 1984); In re Grand Jury Proceedings, 558 F. Supp. 532 (W.D. Va. 1983).

B. What Is Covered By Rule 6(e)

Rule 6(e) prohibits the disclosure of any information that would reveal "matters occurring before the grand jury." Rule 6(e) does not cover all information developed during the course of a grand jury investigation; only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury.8/ Rule 6(e) does not apply to material obtained or created independently of the grand jury as long as the disclosure of such material does not reveal what transpired before or at the direction of the grand jury.9/ Rule 6(e) also does not apply to information that has become a matter of public record, for example, by its introduction at trial.10/

8/ See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987).

9/ See In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982).

10/ See United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987); Sisk v. C.I.R., 791 F.2d 58 (6th Cir. 1986).

Attorneys should consult the case law in the jurisdiction where the grand jury is sitting to determine what materials constitute "matters occurring before the grand jury." The following sections provide general guidelines on how certain categories of information have been treated under Rule 6(e).

1. Grand jury testimony/transcripts/colloquy

Transcripts of witness testimony, statements made by Government attorneys, and any other statements made by or before the grand jury, while in session, clearly constitute "matters occurring before the grand jury" and may not be disclosed, except in conformity with one of the exceptions to Rule 6(e).11/ Some courts have held that the court's charge to the grand jurors is not covered by Rule 6(e) because the ground rules by which the grand jury operates do not reflect matters

occurring before the grand jury.12/

11/ See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856 (D.C. Cir. 1981). But see In re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (court may permit disclosure of grand jury testimony if disclosure is in public interest).

12/ United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973). But see United States v. Hart, 513 F. Supp. 657 (E.D. Pa. 1981).

2. Documents

The courts differ widely as to the extent that documents are considered "matters occurring before the grand jury." Therefore, the local rules and the case law in the jurisdiction where the grand jury is sitting should be carefully consulted before any documents are disclosed.

Rule 6(e) usually does not govern the disclosure of documents obtained by means independent of the grand jury.13/ This is true even when such documents have later been examined by the grand jury or made grand jury exhibits so long as disclosure of the documents does not reveal that they were exhibits.14/

Most courts do not consider individual documents subpoenaed by the grand jury to be "matters occurring before the grand jury." The rule that has evolved is that Rule 6(e) does not apply to subpoenaed documents that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury investigation.15/ As explained in

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13/ See In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); In re Grand Jury Subpoena, 920 F.2d 235 (4th Cir. 1990); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980).

14/ See Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987); United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980).

15/ See SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d at 1000-01; United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). But see In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988); In re Grand Jury Disclosure, 550 F. Supp. 1171 (E.D. Va. 1982). United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979), at 291:

> Unlike testimony, documents are created for purposes other than the grand jury investigation; they are, therefore, more likely to be useful for purposes other than revealing what occurred before the grand jury.

The Division's general policy is to treat individual documents subpoenaed by the grand jury as not covered by

Rule 6(e) unless disclosure of the documents would reveal the scope, direction, or other secret aspect of the investigation or would implicate one of the secrecy concerns of the rule. Collections of documents, as opposed to individual documents, are more likely to be treated as covered by Rule 6(e). Division attorneys should be particularly careful in those jurisdictions that are beginning to take a broader view of the coverage of Rule 6(e) in light of the suggestion in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983), that subpoenaed documents should be treated the same as testimony.16/ The Sixth Circuit in In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988), established a broad presumption that subpoenaed documents are covered by Rule 6(e). In deviating from the rule in most other circuits, the court held at p. 866:

16/ See United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987).

> The general rule, however, must be that confidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury' just as much as testimony before the grand jury.

A court is more likely to treat subpoenaed documents as covered by Rule 6(e) if the request is framed in terms of

the grand jury investigation, for example, a request that calls for the disclosure of all documents subpoenaed by a particular grand jury or a list or inventory of all such documents, because such a request is more likely to reveal the scope or direction of the investigation.17/ In general, the greater the number of documents sought, the more likely that disclosure is prohibited by Rule 6(e).18/

Different considerations may also apply to documents such as affidavits, narratives and summaries that are prepared specifically by the subpoena recipient for the grand jury and frequently submitted in lieu of an actual grand jury appearance or underlying documents. The policy reasons for grand jury secrecy apply more strongly to such documents because they

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17/ See Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 868-70 (D.C. Cir. 1981); see also United States v. Stanford, 589 F.2d at 291 n.6; In re Doe, 537 F. Supp. 1038 (D.R.I. 1982). But see United States v. Saks & Co., 426 F. Supp. 812 (S.D.N.Y. 1976).

18/ See In re Grand Jury Disclosure, 550 F. Supp. supra. But see Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d supra.

resemble testimony and are more likely than ordinary business records to reveal the nature and scope of the grand jury's investigation.19/

While Rule 6(e) may not apply to the disclosure of subpoenaed documents, a court order may, nevertheless, be required for their public disclosure. Subpoenaed documents remain the property of the person from whom they were

subpoenaed, the grand jury having only temporary custody.20/ Where the owner of the documents does not consent to their release, disclosure must be authorized by the court. The standard for such authorization is not Rule 6(e), but whether the party seeking the documents is lawfully entitled to have access to them.21/

Before disclosing any documents subpoenaed by the grand jury, attorneys should be certain that disclosure is not restricted by another statute. For example, the Right to Financial Privacy Act of 1978, (12 U.S.C. § 3420) requires that protected financial records subpoenaed by a grand jury be accorded the same protections as Rule 6(e) material. Similarly, the Tax Reform Act of 1976, (26 U.S.C. § 6103) restricts disclosure of tax information obtained from the Internal Revenue Service, irrespective of whether it has been presented to a grand jury.

19/ See In re Special February, 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983).

20/ See United States v. Interstate Dress Carriers, Inc., 280 F.2d at 54; In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979); In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985).

21/ See United States v. Interstate Dress Carriers, Inc., 280 F.2d at 54; Capitol Indem. Corp. v. First Minnesota Constr. Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972).

As a matter of Department policy, an attorney should not initiate the disclosure of subpoenaed documents to

another attorney working solely on civil matters without an appropriate court order.22/ This policy does not apply to materials that were created for a purpose independent of the grand jury.23/

3. Government memoranda summarizing or referring to testimony or documents

Government memoranda, or portions thereof, that summarize or refer to grand jury testimony or documents are covered by Rule 6(e) to the extent that their disclosure would reveal "matters occurring before a grand jury." Documents prepared by an attorney or his authorized assistants that reflect grand jury information cannot be disclosed.24/

Government memoranda, or portions thereof, that excerpt, refer to, or discuss grand jury testimony are covered by Rule 6(e) and may not be disclosed except as provided by Rule 6(e).25/ Government memoranda that reflect information provided by witnesses

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22/ See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 15-16.

23/ See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 53, 79.

24/ See In re Special February 1975 Grand Jury, 662 F.2d 1232, 1238 (7th Cir. 1981), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 17.

outside of the grand jury room usually are not covered by Rule 6(e).26/

Government memoranda that analyze documents subpoenaed by the grand jury have at least the same protection under Rule 6(e) as the subpoenaed documents. In some instances, the disclosure of an analysis of subpoenaed documents may reveal more about the strategy and direction of an investigation than would disclosure of the documents alone. In these instances, the analysis should not be disclosed.27/ Memoranda reflecting information obtained independent of the grand jury, such as summaries of bidding information prepared by other agencies, ordinarily should be treated as outside of the coverage of Rule 6(e), even if the document is later submitted to the grand jury.28/ However, one circuit court has held that an analysis of information obtained independently of the grand jury that was prepared specifically for the grand jury is covered by Rule 6(e).29/ Also,

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25/ See In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501, 505 (5th Cir. 1980); U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978).

26/ See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982). But see In re Special February 1975 Grand Jury, 662 F.2d at 1238; In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672 (D. Or. 1985) (Memorandum of a post-grand jury appearance interview treated as covered by Rule 6(e)).

27/ See In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Special February, 1975 Grand Jury, 662 F.2d at 1238.

28/ See In re Grand Jury Matter (Catania), 682 F.2d at 64; Sisk v. C.I.R., 791 F.2d 58 (6th Cir. 1986).

29/ In re Grand Jury Matter, 697 F.2d at 513.

at least one district court has held that Government memoranda requesting authority for conducting a grand jury are covered by Rule 6(e) because such memoranda provide a blueprint for the Government's investigation.30/

4. Nature of investigation or identity of targets

Generally, it is necessary to disclose at least some information describing the nature of a grand jury inquiry during the course of an investigation. In most circumstances, such information should be very general. For example, a Government attorney could say, "We are investigating a possible price-fixing conspiracy in the road building industry." In some situations, such as during plea negotiations or witness interviews, it may be appropriate to summarize the evidence in somewhat greater detail. This should be done only when necessary for the effective conduct of the investigation. Attorneys should be careful not to disclose the identities of specific witnesses, actual verbatim testimony or other information that would reveal the strategy or precise direction of the investigation or anything that has actually occurred before the grand jury.31/

30/ In re Disclosure of Grand Jury Matters (Miller Brewing Co.), 518 F. Supp. 163 (D. Wis.), modified on other grounds, 687 F.2d 1079 (7th Cir. 1981).

31/ See United States v. Bazzano, 570 F.2d 1120, 1125 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978).

The identities of the targets of the investigation should not be disclosed since one of the specific interests that Rule 6(e) serves is to protect individuals who ultimately are not indicted from unfavorable publicity.32/ The exception to this is disclosure to the targets of their status as targets.33/ An attorney may also, as appropriate, tell opposing counsel whether his client is a target, subject or just an informational witness.

5. Local rules may provide for additional secrecy

The local rules in a particular jurisdiction may provide for additional secrecy. For example, the local rules of the South Dakota District Court contain particularly strict secrecy requirements for subpoenaed documents. Consequently, the local rules regarding the disclosure of information concerning the grand jury should be carefully reviewed before making any disclosures.

6. Access to ministerial grand jury records

Ministerial records that relate to the procedural aspects of the grand jury usually fall within the scope of Rule 6(e). Such records may not

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32/ See United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983).

33/ See U.S.A.M. 9-11.153.

be disclosed if the legitimate interests protected by Rule 6(e) would be threatened.34/

Rule 6(e)(6) provides that: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." Records, orders, and subpoenas relating to the grand jury should not be disclosed so long as they remain under seal.

The scope of Rule 6(e)(6) is not entirely clear, as the term "records" is not defined. The notes of the Advisory Committee on the Federal Rules of Criminal Procedure include the Department of Justice authorization to a U.S. Attorney to apply to the court for a grant of immunity for a witness as included within the scope of the rule. In re Grand Jury Impanelled March 8, 1983, 579 F. Supp. 189 (E.D. Tenn. 1984), one of the few cases to interpret Rule 6(e)(6), states, without discussion, that motions to quash subpoenas are not covered by Rule 6(e)(6). However, the court also held that motions, briefs and the like that tend to reveal the substance of grand jury records, orders and subpoenas, nonetheless, should be sealed to protect the information contained in them. The court in In re Donovan, 801 F.2d 409 (D.C. Cir. 1986), suggests

that motions for disclosure of grand jury information are subject to Rule 6(e)(6), but only to the extent that the motion contains information that is subject to the general rule of secrecy.

34/ In re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982); see also United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) (the court's charge to the grand jury is not covered by Rule 6(e)).

Until there is further interpretation of Rule 6(e)(6), Division attorneys should file preindictment motions, subpoenas, letters of authorization, immunity orders and the like under seal, unless there are compelling reasons to the contrary.35/ Similarly, efforts to discover other ministerial records, such as docket sheets and attendance and impaneling records, should be resisted if any of the policy reasons behind Rule 6(e) are implicated.36/

7. Names of witnesses

Rule 6(e) prohibits the disclosure of the identities of witnesses subpoenaed by or appearing before the grand jury.37/

8. Interview memoranda

According to the majority view and the general policy to be followed by Division attorneys, Rule 6(e) does not apply to witness interview memoranda, even if the statements contained therein are later reported to

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35/ A time-saving procedure is to have the Impounding Order that is filed at the beginning of the investigation contain language that provides for the automatic sealing of motions, subpoenas, etc.

36/ See In re Special Grand Jury (For Anchorage, Alaska), 674 F.2d supra.

37/ See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. White Ready-Mix Concrete Co., 509 F. Supp. 747, 750 (N.D. Ohio 1981).

the grand jury by the investigation staff or repeated to the grand jury by the witness.38/ The local case law should be carefully reviewed before disclosing any interview memoranda, as several courts have treated interview memoranda that were later presented to the grand jury similarly to transcripts of grand jury testimony.39/

9. Proffer memoranda

Proffer memoranda should be treated similarly to interview memoranda. As a general rule, proffers should not be treated as covered by the secrecy requirements of Rule 6(e), because they reflect information that is obtained independently of the grand jury.40/ This is particularly true when the witness providing the proffer is not later called before the

grand jury. Attorneys should carefully consult the local case law as a few

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38/ See Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), cert. denied, 483 U.S. 1021 (1987); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987); In re Grand Jury Proceedings (Bath Iron Works), 505 F. Supp. 978, 980 (D. Me. 1981); In re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207, 211 (D.R.I. 1980).

39/ In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982) (interview memoranda should be treated the same as grand jury transcripts); In re Special February, 1975 Grand Jury, 662 F.2d 1232, 1237-38 (7th Cir. 1981) (in certain very limited circumstances, a report of an interview given in lieu of a grand jury appearance is covered by Rule 6(e)), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672 (D. Or. 1985) (post-appearance statements by witness of what transpired before grand jury covered by Rule 6(e)).

40/ Disclosure of interview and proffer memoranda may be resisted on other grounds; e.g., the attorney work-product and informants' privileges.

jurisdictions treat documents that reveal what will happen before the grand jury in the future, such as proffers, as covered by

the rule.41/

C. Disclosure to Attorneys for the

Government, Rule 6(e)(3)(A)(i)

Rule 6(e)(3)(A)(i) permits the disclosure of information covered by Rule 6(e) without a court order to "an

attorney for the government for use in the performance of such attorney's duty."42/

1. Definition of "attorney for the government"

Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorney for the government" as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney." The definition includes not only those attorneys who actually appear before the grand jury but also supervisory attorneys who are working on the matter.43/ It also includes

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41/ See In re Grand Jury Investigation (Lance), 610 F.2d 202, 216-17 (5th Cir. 1980); United States v. Armco Steel, 458 F. Supp. 784 (W.D. Mo. 1978).

42/ See generally U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984.

43/ United States v. Sells Eng'g, Inc., 463 U.S. 418, 429 n.11 (1983).

attorneys who are operating under a special appointment.44/

Those Division attorneys who actually appear before the grand jury receive letters signed by the Assistant Attorney General for the Antitrust Division authorizing them to appear before the grand jury as "an authorized assistant of the Attorney General." A letter of authorization is not necessary prior to appearing before the grand jury and failure to obtain one

will not invalidate a subsequent indictment.45/

Disclosure is not permitted to attorneys for federal administrative agencies,46/ Parole Commission hearing officers,47/ or state governments.48/ However, a non-Department of Justice attorney (including a state prosecutor or federal agency attorney), appointed under 28 U.S.C. § 515, as a Special Assistant United States Attorney or Special Assistant to the Attorney General, is an "attorney for the government" for purposes of

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44/ See In re Subpoena of Persico, 522 F.2d 41 (2d Cir. 1975); In re Perlin, 589 F.2d 260, 266 (7th Cir. 1978); United States v. Zuber, 528 F.2d 981 (9th Cir. 1976); United States v. Mitchell, 397 F. Supp. 166 (D.D.C.), aff'd, 559 F.2d 31 (D.C. Cir. 1974), cert. denied, 431 U.S. 933 (1977).

45/ United States v. Balistrieri, 779 F.2d 1191 (7th Cir.), cert. denied, 475 U.S. 1095 (1985).

46/ See United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

47/ See Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

48/ See Illinois v. Abbott & Assocs., Inc., 460 U.S. 557 (1983); In re Grand Jury Proceedings, 580 F.2d 13 (1st Cir. 1978); United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973).

the rule.49/ While the definition would appear to include attorneys working on civil and criminal matters, the Supreme Court held in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), that Rule 6(e)(3)(A)(i) permits disclosure only to attorneys working on criminal matters.

2. Policy after Sells

Prior to Sells, the Department interpreted Rule 6(e)(3)(A)(i) to permit an attorney conducting a civil investigation to utilize, without obtaining prior judicial approval, Rule 6(e) material from a prior or concurrent criminal investigation conducted by other Department attorneys. This interpretation was rejected by the Supreme Court in Sells. The Supreme Court held that Government attorneys may not automatically obtain grand jury materials for use in a civil matter under Rule 6(e)(3)(A)(i), but must obtain a court order to secure such materials under Rule 6(e)(3)(C)(i).50/

Sells should not retroactively affect final judgments, pending litigation or ongoing civil investigations in which grand jury materials have already been disclosed under either Rule 6(e)(3)(A)(i) or a pre-Sells

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49/ See In re Perlin, 589 F.2d at 265-67. Great care should be taken with the use of cross-designated state attorneys since it is unclear how courts will apply existing disclosure law to all aspects of the cross-designation program. See ATD Manual VII-10 for additional information on this program.

50/ The Court declined to address the issue of "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal proceedings." 463 U.S. at 430 n.15. See § 3., infra.
Rule 6(e)(3)(C)(i) order.51/ Chevron Oil Co. v. Huson, 404 U.S. 97, 105-09 (1971), should govern the retroactivity of Sells.

Although Sells should not affect the past use of grand jury materials, it may restrict the continued use of such

materials. United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987), permitted continued use in the context of that case; however, most courts have not permitted such use.52/ Attorneys working on civil matters who want to continue to use previously disclosed grand jury materials should file (C)(i) motions to preclude later motions for sanctions.53/

3. Use of grand jury materials for civil cases in the Antitrust Division

As a general rule, grand jury information may not be used for civil investigations or cases. However, much of the material developed during the course of a criminal investigation is not covered by Rule 6(e) and, consequently, may be disclosed to civil investigation staffs. It is

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51/ See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 33-40; United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987).

52/ See In re Grand Jury Proceedings (Kluger), 631 F. Supp. 1542 (E.D.N.Y. 1986), modified, 827 F.2d 868 (2d Cir. 1987).

53/ See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984 at 65.

imperative that attorneys carefully distinguish between Rule 6(e) and non-Rule 6(e) materials. If an attorney is uncertain whether the material to be disclosed is subject to Rule 6(e), he should file a notice of use with the court. This will provide the court with an opportunity to respond to the notice with an order to file a motion under Rule 6(e)(3)(C)(i), should one be necessary. In the alternative, attorneys may file a motion for use, attaching a proposed order.

An attorney who was involved in a grand jury proceeding as a member of the prosecution team (including supervisory attorneys) may, without prior authorization of the court, continue to use materials subject to Rule 6(e) in a companion or related civil proceeding as long as such use does not contravene Rule 6(e)'s purposes.54/ An attorney who so uses Rule 6(e) material should be careful not to disclose the material to other members of the civil staff who were not members of the prior criminal staff or to disclose the Rule 6(e) material in civil pleadings and the like.

Use of grand jury materials for civil matters by attorneys who were not members of the grand jury staff after the close of the grand jury without indictment or concurrently with a criminal matter involving the same party or parties is not permitted unless an appropriate order under Rule 6(e)(3)(C)(i) is obtained from the court. However, there is no requirement to use separate staffs to investigate or litigate similar matters or matters that may involve use of the staff attorney's unrefreshed recollection of

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54/ United States v. John Doe, Inc., I, 481 U.S. 102 (1987).

grand jury information.55/ Extreme caution should be exercised by such staffs not to improperly disclose information subject to Rule 6(e).

Attorneys working on criminal matters may not use Civil Investigative Demands (CIDs) to obtain information for criminal investigations.56/ However, a CID investigation may be converted to a criminal investigation and information lawfully obtained during a legitimate civil investigation may later be used for a criminal investigation.57/ Nonetheless, a common practice within the Division is to issue a grand jury subpoena for documents or information previously obtained by a CID.

D. Disclosure to Other Government Personnel;
Rules 6(e)(3)(A)(ii) and 6(e)(3)(B)

1. Definition of Government personnel

Under Rule 6(e)(3)(A)(ii), grand jury information may be disclosed without a court order to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

55/ See United States v. Archer-Daniels-Midland Co., 785 F.2d 206 (8th Cir. 1986), cert. denied, 481 U.S. 1028 (1987).

56/ 15 U.S.C. § 1312(a).

57/ 15 U.S.C. § 1313(d)(1).

"Government personnel" includes all federal Government employees who are assisting attorneys in the investigation and prosecution of criminal violations.58/ Government "personnel" includes not only members of the prosecution support staff, such as economists, secretaries, paralegals and law clerks, and federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the Government prosecutor.59/ At least one court includes temporary Government personnel and independent contractors employed by the agency within the rule.60/ However, individuals who are cooperating with the Government in connection with a particular investigation without reimbursement for their services, such as informants, are not permitted access to grand jury materials.61/

Prior to the 1985 amendment to Rule 6(e)(A)(ii), the law was unclear as to whether state and local government personnel were included within the "government personnel" exception to Rule 6(e). Most courts that had addressed the issue held that "government personnel" includes only Federal

58/ See United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); United States v. Bazzano, 570 F.2d 1120 (3d Cir.

1977), cert. denied, 436 U.S. 917 (1978); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979); In re Grand Jury, 583 F.2d 128 (5th Cir. 1978); In re Perlin, 589 F.2d 260 (7th Cir. 1978).

59/ See United States v. Jones, 766 F.2d 994 (6th Cir.), cert. denied, 474 U.S. 1006 (1985); United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); United States v. Block, 497 F. Supp. 629 (N.D. Ga. 1980), aff'd, 660 F.2d 1086 (5th Cir. Unit B Nov. 1981).

60/ United States v. Lartey, 716 F.2d at 963-64; see also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985). See § J. below for the Division's policy regarding disclosure to independent contractors.

61/ See United States v. Tager, 638 F.2d 167 (10th Cir. 1980).
Government employees.62/ The 1985 amendment to Rule 6(e)(3)(A)(ii) has resolved the split by expressly including "personnel of a state or subdivision of a state" within the scope of the rule. Because of the peculiar nature of the District of Columbia, its employees are included within the Government personnel exception to Rule 6(e) as federal personnel.63/

Strict precautions should be taken when disclosing information to Government employees who have civil law enforcement functions, such as IRS agents, to ensure that grand jury materials are not used improperly for civil purposes. Personnel assisting the grand jury investigation ordinarily should not work on a related civil matter and should receive precautionary instructions, preferably in writing, regarding the use and disclosure of grand jury materials.64/

2. When necessary to assist in enforcing federal criminal laws

Disclosure to Government personnel under Rule 6(e)(3)(A)(ii) is permitted only when necessary to assist in enforcing federal criminal laws.

62/ See In re Grand Jury Proceedings, 580 F.2d 13 (1st Cir. 1978). But see In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979).

63/ United States v. McRae, 580 F. Supp. 1560 (D.D.C. 1984).

64/ See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976); see also Fed. R. Crim. P. 6(e)(3)(B).

This rule does not permit disclosure for civil law enforcement purposes.65/ Further, this rule requires that the disclosure be enforcement-related and does not permit the disclosure of grand jury materials after the completion of prosecution. One court has gone so far as to hold that probation officers who prepare presentence investigation reports are not permitted access to grand jury materials because they do not assist in either the investigation or the prosecution of the case.66/ The Division disagrees with this holding and believes that attorneys may include grand jury information in presentence reports, because partaking in the sentencing process is part of the Government attorneys' "duty to enforce federal criminal law." In addition, disclosure to the District Court via its probation service as part of the sentencing process embodied by Rule 32 should not be considered a disclosure as contemplated by Rule 6(e).67/ Attorneys should consult the local U.S. Attorney's office to determine the local practice as to whether Rule 6(e) information may be contained in presentence reports.

There must be a need for assistance before disclosure may be made under Rule 6(e)(3)(A)(ii). The determination of the need for assistance is

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65/ See In re Perlin, 589 F.2d 260, 268-69 (7th Cir. 1978); In re Grand Jury Investigation No. 78-184, 642 F.2d 1184 (9th Cir. 1981), aff'd sub nom. United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

66/ United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980); see also Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

67/ It may be appropriate to file sentencing memoranda that contain grand jury information under seal unless there is a specific need for public disclosure. See United States v. Alexander, 860 F.2d 508 (2d Cir. 1988).
within the discretion of the prosecutor and need not be justified.68/ Nonetheless, Government prosecutors should be wary of abusing this discretion and should limit the disclosure of grand jury materials as much as practicable.

Disclosure under Rule 6(e)(3)(A)(ii) to Government personnel for use in a separate investigation is not permitted. Government personnel who are seeking discovery of grand jury material for use in a different investigation must proceed under Rule 6(e)(3)(A)(i) or Rule 6(e)(3)(C)(i).

3. No need for court authorization

There is no need for court authorization to disclose grand jury materials under Rule 6(e)(3)(A)(ii).69/ When in

doubt as to the applicability of Rule 6(e)(3)(A)(ii), an attorney should consider seeking a court order authorizing release under Rule 6(e)(3)(C)(i).

4. Notice--Rule 6(e)(3)(B)

Rule 6(e)(3)(B) provides that:

68/ See In re Perlin, 589 F.2d at 268.

69/ See United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

> Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of

their obligation of secrecy under this rule.

Under this rule, a list of all Government personnel to whom disclosure has been made must be promptly provided to the supervising judge. While not required by the rule, whenever possible, the list of names should be furnished to the court before the information is disclosed.70/ Such prior notice is what Congress contemplated when it amended Rule 6(e) in 1977.71/ If prior notice is not possible, then the court should be notified of disclosure as soon thereafter as possible. The 1985 amendments to Rule 6(e)(3)(A)(ii) also require certification that all persons to whom grand jury material have been disclosed under this rule have been advised of their obligation of secrecy under Rule 6(e).72/

70/ See United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980).

71/ S. Rep. No. 354, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 530.

72/ A sample letter containing precautionary instructions is attached as Appendix II-1.
Standard Division policy is to list Division economists, contractors and agents of other Government agencies in the disclosure notice. Secretaries, paralegals and clerical staffs need not be listed as they may be considered the alter egos of the attorneys, economists, agents and others whom they assist.

5. Record of disclosure/advice of secrecy

Attorneys conducting criminal investigations and prosecutions should keep detailed records of disclosures made under Rule 6(e)(3)(A)(ii) and should advise all recipients of grand jury materials of the secrecy requirements of Rule 6(e). Written precautionary instructions are preferable as they can be used in any hearing challenging the grand jury procedures.73/

E. Disclosure To Witness

1. Access to own transcript

73/ See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

The large majority of courts have held that neither the Federal Rules of Criminal Procedure74/ nor the Freedom of Information Act75/ gives a grand jury witness a general right to a transcript of his own testimony. The same standards governing disclosure of matters occurring before the grand jury in general are applicable to a witness' access to a transcript of

his testimony.

Under Rule 6(e)(3)(D), a witness who wishes to obtain a transcript of his grand jury testimony must file a motion in the district where the grand jury was convened. Disclosure is permitted only when ordered by a court "preliminarily to or in connection with a judicial proceeding" upon a finding that a "particularized need" exists for the desired disclosure that outweighs the need for maintaining the secrecy of the transcript.76/ As discussed in § H infra, particularized need is not a standard easily met.

A few courts have granted witnesses pretrial access to grand jury transcripts absent a showing of particularized need, reasoning that Rule

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74/ See In re Bianchi, 542 F.2d 98 (1st Cir. 1976); Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); Bast v. United States, 542 F.2d 893 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973). But see In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989); In re Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975); United States v. Scott Paper Co., 254 F. Supp. 759 (W.D. Mich. 1966).

75/ Thomas v. United States, 597 F.2d 656 (8th Cir. 1979); Valenti v. United States Dep't of Justice, 503 F. Supp. 230 (E.D. La. 1980).

76/ See Fed. R. Crim. P. 6(e)(3)(C)(i); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Dennis v. United States, 384 U.S. 855 (1966); United States v. Procter & Gamble Co., 356 U.S. 677 (1958).
6(e) does not prohibit disclosure to a witness who already has knowledge of his testimony.77/

2. Antitrust Division policy regarding disclosure of grand jury transcript to a witness

Given the case law noted above, a witness is not entitled to automatic access to a transcript of his grand jury testimony. However, as part of an attorney's preparation for trial, he may allow a witness to review his prior grand jury testimony.78/

In some jurisdictions, an attorney for the Government may need to obtain an order under Rule 6(e)(3)(C)(i) before disclosing the witness' transcript to the witness. The Government's motion for disclosure should state that disclosure to a prospective witness of his grand jury testimony is necessary to assist the witness in preparing for trial or an upcoming grand jury session and involves minimal secrecy concerns.

Attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's office before disclosing to a witness a transcript of his grand jury testimony.

77/ In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972);

United States v. Heinze, 361 F. Supp. 46, 57 (D. Del. 1973).

78/ See United States v. Garcia, 420 F.2d 309 (2d Cir. 1970); United States v. Heinze, 361 F. Supp. 46 (D. Del. 1973).

3. Disclosure to a witness of another's grand jury transcript or testimony

It is improper to disclose the grand jury testimony of one witness to another witness. In United States v. Bazzano, 570 F.2d 1120, 1124-26 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978), the court held that Rule 6(e) is violated whenever a Government attorney or agent discloses the grand jury testimony of one witness to another in order to shape either or both witnesses' trial testimony. The court, however, distinguished such improper disclosure from the acceptable practice of a prosecutor who, in a pretrial interview (or in the grand jury room), restates in general terms the evidence which other witnesses have given.

4. Disclosure to a witness of documents subpoenaed from another party

It may be necessary for the staff to disclose to a witness documents subpoenaed from another party in order to

impeach the witness, refresh the witness' recollection, authenticate a document, identify handwriting or encourage truthful testimony. Before a witness is shown a document subpoenaed from another party, attorneys should be thoroughly familiar with the case law and the local rules governing the disclosure of subpoenaed documents in the jurisdiction in which they are practicing.79/

The case law on whether subpoenaed documents constitute matters occurring before a grand jury is not settled.80/ Many courts have reasoned that when a particular subpoenaed document is sought or disclosed for a lawful and independent purpose "for its own sake - for its intrinsic value in the furtherance of a lawful investigation," it does not necessarily constitute a matter occurring before the grand jury.81/

The approach adopted by the Third, Seventh, and District of Columbia Circuits requires the court to conduct a factual inquiry into whether disclosure of subpoenaed documents will reveal the inner workings of the grand jury.82/ Several district courts have also used this approach to various degrees.83/ Under this approach, only those subpoenaed documents

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79/ Staff should also be aware of any legal restrictions other than Rule 6(e) imposed on the disclosure and use of subpoenaed documents, such as bank records. See Right to Financial Privacy Act, 12 U.S.C. § 3420.

80/ See § B.2., supra for a full discussion of the treatment of subpoenaed documents under Rule 6(e).

81/ SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

82/ Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869-70 (D.C. Cir. 1981);n In re Grand Jury Investigation, 630 F.2d 996, 1001 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1090 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

83/ E.g., In re Doe, 537 F. Supp. 1038 (D.R.I. 1982) (thorough review of case law on the applicability of Rule 6(e) to grand jury documents).
revealing some secret aspect of a grand jury's investigation would be governed by Rule 6(e) and would require a showing of "particularized need" before disclosure would be permitted. Accordingly, a court order allowing disclosure to a witness might not be necessary in these jurisdictions.

Other courts have held that subpoenaed documents and transcripts of grand jury testimony are subject to the same degree of secrecy and that the court must balance the need of the party seeking disclosure against the effect such disclosure would have on the policies underlying grand jury secrecy.84/ In these jurisdictions, a court order would be necessary before showing a witness documents subpoenaed from another party.

F. Disclosure to Defendant - Bases for Pre-Trial Discovery of Grand Jury Material

There are four commonly encountered bases for disclosure of grand jury material to a criminal defendant. Three

of these are covered by specific provisions of the Federal Rules of Criminal Procedure; the fourth (Brady material) has its origin in due process analysis.

84/ In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988); Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1008-09 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1022 n.17 (D. Conn.), aff'd on other grounds, 665 F.2d 24 (2d Cir. 1981), cert. denied, 460 U.S. 1068 (1982); In re Grand Jury Disclosure, 550 F. Supp. 1171, 1177 (E.D. Va. 1982).

1. Disclosure to defendant of his own testimony

Rule 16(a)(1)(A) provides that, upon request, an individual defendant shall be permitted to inspect and copy or photograph:

(1) written or recorded statements by him;

(2) oral statements made by the defendant to a person then known to the defendant to be a Government agent; and

(3) testimony of a defendant before a grand jury which relates to the events charged.

Grand jury testimony is producible to a defendant only if "relevant" to the case in which production is requested.85/ With respect to corporate defendants, Rule 16(a)(1)(A) provides that, upon request, the corporation may obtain transcripts of relevant grand jury testimony of its officers or employees who had the authority to bind the corporation legally for the alleged offense, either at the time of their testimony or when the alleged offense was committed.86/ Division policy is to require a written representation from defendants' counsel that the employees were in a position to bind the corporation before disclosing their statements.87/ The

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85/ United States v. Disston, 612 F.2d 1035, 1037 (7th Cir. 1980).

86/ At least one court has held that a corporate defendant is entitled to non-grand jury statements to the same extent as an individual defendant. In re United States, 918 F.2d 138 (11th Cir. 1990).

87/ Normally, an order is entered that restricts any further disclosure of such testimony by the corporate defendant. grand jury witness whose testimony is to be produced should be notified of the Rule 16 motion since the witness has standing to object to disclosure.88/

The Government is not required by Rule 16 to disclose the transcript of a non-defendant witness who reiterates what was said by a defendant.89/ Such a transcript, however, may have to be disclosed under the Jencks Act and Rule 26.2, as discussed below.

2. Disclosure of grand jury transcripts of Government witnesses pursuant to the Jencks Act and Rule 26.2

Both the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2,90/ provide that, upon motion, a criminal defendant is entitled to the production of the prior statements of the prosecution witnesses on relevant matters after such witnesses have testified on direct examination. Under Rule 26.2(f)(3), which carries forward a provision that was added to the Jencks Act in 1970, "a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury" is included in

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88/ See United States v. RMI Co., 599 F.2d 1183 (3d Cir. 1979); United States v. White Ready-Mix Concrete Co., 449 F. Supp. 808 (N.D. Ohio 1978).

89/ See United States v. Callahan, 534 F.2d 763 (7th Cir.), cert. denied, 429 U.S. 830 (1976); United States v. Walk, 533 F.2d 417 (9th Cir. 1975).

90/ Rule 26.2, which became effective on December 1, 1980, transfers the substance of the Jencks Act from Title 18 to the Federal Rules of Criminal Procedure and makes production of "statements" of a witness to the opposing side an obligation of the defendant as well as the prosecution.

the definition of "statement." The Jencks Act applies only to criminal trials, not to pretrial proceedings, such as suppression or preliminary hearings.91/

The Government is required to produce only those transcripts that relate to the subject matter of the witness' testimony.92/ When there is a dispute as to whether the transcript relates to the subject matter, the court determines whether the transcript ought to be produced in whole or in part. If, after reviewing the challenged transcript in camera, the court concludes that only part of a witness' grand jury transcript relates to the subject matter concerning which the witness has testified, the court will excise the unrelated portions and order the remainder of the transcript to be produced to the moving party. This procedure is required by Rule 26.2(c) which provides:

> If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection

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91/ United States v. Sebastian, 497 F.2d 1267, 1268-70 (2d Cir. 1974); United States v. Montos, 421 F.2d 215, 220-21 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); Robbins v. United States, 476 F.2d 26, 32 (10th Cir. 1973).

92/ United States v. Ferreira, 625 F.2d 1030, 1034 (1st Cir. 1980); United States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975); United States v. Smaldone, 544 F.2d 456, 460 (10th Cir.), cert. denied, 430 U.S. 967 (1976).

shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

The Jencks Act and Rule 26.2 require that the court-ordered production of a witness' grand jury transcript be made after the witness has completed his direct testimony;93/ however, if appropriate concessions are made by defendants, arrangements may sometimes be made to provide Jencks Act materials to the defendant in advance of trial. The trial court is without power to order the early disclosure of Jencks Act materials.94/

93/ United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Callahan, 534 F.2d 763 (7th Cir.), cert. denied, 429 U.S. 830 (1976); United States v. Eisenberg, 469 F.2d 156 (8th Cir. 1972), cert. denied, 410 U.S. 992 (1973); see United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987); United States v. Liuzzo, 739 F.2d 541 (11th Cir. 1984). But see United States v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 457 U.S. 1119 (1982).

94/ See, e.g., United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v. Peterson, 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). But see United States v. Evans & Assoc. Constr. Co., 857 F.2d 720 (10th Cir. 1988).

3. Disclosure of grand jury transcripts upon a showing

of grand jury abuse - Rule 6(e)(3)(C)(ii)

Under Rule 6(e)(3)(C)(ii), a court may allow the disclosure of matters occurring before a grand jury at the request of a defendant "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." A presumption of regularity attaches to grand jury proceedings,95/ and the party charging an abuse of the grand jury process carries a heavy burden even to get a hearing on the allegations.96/ In response to such motions to dismiss, courts are generally receptive to the Government's ex parte submission of the grand jury matters at issue for in camera review.

A defendant seeking the production of grand jury transcripts must do more than make general unsubstantiated or speculative allegations of impropriety concerning a grand jury's proceedings to prevail under Rule 6(e)(3)(C)(ii).97/ The defendant's motion must establish that grounds truly

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95/ See United States v. DeVincent, 632 F.2d 147, 154 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. West, 549 F.2d 545, 554 (8th Cir.), cert. denied, 430 U.S. 956 (1977).

96/ See In re Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983). See generally Ch. IV § I., infra for a discussion of grand jury abuse.

97/ See United States v. Budzanoski, 462 F.2d 443 (3d Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Edelson, 581 F.2d 1290, 1291 (7th Cir.), cert. denied, 440 U.S. 908 (1979); United States v. Harbin, 585 F.2d 904, 907 (8th Cir. 1978); United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981).
may exist and that the requested grand jury materials are necessary for a court to determine the allegations of abuse. Defense counsel usually fail to make the requisite showing.98/

4. Disclosure of Brady material

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process if the evidence is material either to guilt or punishment, regardless of the good or bad faith of the Government attorneys in not producing it. Brady did not create an absolute right of access to grand jury testimony of possible defense witnesses.99/

To the extent that the Brady material is contained in grand jury materials other than transcripts of witnesses who will testify, it should be produced. The Government satisfies its Brady obligation so long as it discloses Brady material in sufficient time for the defendant to make

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98/ See United States v. Williams, 644 F.2d 950 (2d Cir. 1981); United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Fife, 573 F.2d 369 (6th Cir. 1976), cert. denied, 430 U.S. 933

(1977); United States v. Edelson, 581 F.2d at 1291; United States v. Harbin, 585 F.2d at 907; United States v. Ferreboeuf, 632 F.2d at 835; United States v. Cole, 755 F.2d 748 (11th Cir. 1985).

99/ See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); United States v. Presser, 844 F.2d 1275, 1284 (6th Cir. 1988); Gollaher v. United States, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960 (1969).
effective use of it.100/ When Brady material, either exculpatory or impeaching, is contained in Jencks Act material, disclosure is timely if the Government complies with the Jencks Act.101/

G. Disclosure to Another Grand Jury--Rule 6(e)(3)(C)(iii)

Rule 6(e)(3)(C)(iii) permits the disclosure of grand jury material "when the disclosure is made by an attorney for the government to another federal grand jury." This exception to Rule 6(e), adopted in 1983, codified the existing case law that permitted, in some circumstances, the disclosure of grand jury material from one grand jury to another.102/ No court order is required prior to disclosure nor must the court be notified of the disclosure.103/ The rule applies to transfers between grand juries in the same district and to transfers between grand juries in different districts.

100/ United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir.), cert. denied, 474 U.S. 1005 (1985); United States v. Presser, 844 F.2d at 1283-84.

101/ United States v. Martino, 648 F.2d 367, 384 (5th Cir. Unit B June 1981), cert. denied, 456 U.S. 943 (1982); see also United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979) (court invalidated discovery order requiring pretrial disclosure of exculpatory Brady material contained in Jencks Act statements).

102/ See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Garcia, 420 F.2d 309 (2d Cir. 1970); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979).

103/ See United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

H. Disclosure Under Court Order-Rule 6(e)(3)(C)(i)

Rule 6(e)(3)(C)(i) provides that:

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made - (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

1. Must be "preliminarily to or in connection with a judicial proceeding"

a. Definition of "judicial proceeding"

The leading definition of judicial proceeding was provided by Judge Learned Hand in Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958):

> [T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.

Under this definition, courts have held that the following qualify as judicial proceedings: the grand jury's own proceedings,104/ other grand juries,105/ attorney and judicial disciplinary proceedings,106/ police officer disciplinary proceedings,107/ Internal Revenue Service and Tax Court proceedings,108/ impeachment hearings,109/ state grand jury proceedings110/ and state criminal trials.111/ The critical factor common to these proceedings is that any post-investigation use of the information would necessarily involve resort to the judicial system. Judicial proceedings

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104/ See In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979).

105/ See United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Mayes, 670 F.2d 126 (9th Cir. 1982). Contra United States v. Tager, 638 F.2d 167 (10th Cir. 1980). New Rule 6(e)(3)(C)(iii) eliminates this conflict.

106/ In re Federal Grand Jury Proceedings, 760 F.2d 436 (2d Cir. 1985); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978); In re Barker, 741 F.2d 250 (9th Cir. 1984). But see In re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991).

107/ See Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970).

108/ See Patton v. C.I.R., 799 F.2d 166 (5th Cir. 1986); Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975).

109/ See Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

110/ See In re Disclosure of Evidence, 650 F.2d 599 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981).

111/ See In re Grand Jury Proceedings, 654 F.2d 268, 271-72 (3d Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979).
that are instituted solely to obtain grand jury materials, while technically meeting the definition of "judicial proceeding", do not fall within the scope of Rule 6(e)(3)(C)(i).112/

When a Government agency seeks disclosure for use in an administrative proceeding for which no judicial action is planned, the majority of courts will not permit disclosure. For example, the courts have held that the following ordinary administrative proceedings do not qualify as judicial proceedings: parole revocation hearings,113/ Federal Energy Regulatory

Commission preliminary investigations,114/ Federal Maritime Commission adjudicatory hearings,115/ state medical board investigations,116/ and Federal Trade Commission investigations.117/ The essential difference between judicial proceedings and ordinary administrative proceedings is that in the former, judicial review is clearly intended to be part of the decision-making process while in the latter, judicial review remains speculative.

112/ See American Friends Serv. Comm. v. Webster, 720 F.2d 29 (D.C. Cir. 1983).

113/ See Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

114/ See In re J. Ray McDermott and Co., 622 F.2d 166 (5th Cir. 1980).

115/ See United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980).

116/ See United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980).

117/ See In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

b. Definition of "preliminarily to"

The Supreme Court in United States v. Baggot, 463 U.S. 476 (1983), held that a civil tax audit is not preliminary

to a judicial proceeding within the meaning of Rule 6(e)(3)(C)(i). In reaching this conclusion, the Court enunciated a two-pronged definition of "preliminarily to." First, Rule 6(e)(3)(C)(i) "contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated."118/ Disclosure is not "preliminarily to" a judicial proceeding "if the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding."119/ Second, litigation must be more than a remote contingency. The Court left open the question of just "how firm an agency's decision to litigate must be before its investigation can be characterized as "preliminar[y] to a judicial proceeding'."120/

2. Must show particularized need

A court may permit disclosure of grand jury materials under Rule 6(e)(3)(C)(i) only when the requesting party has demonstrated a "particularized need" for the material. The particularized need standard

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118/ 463 U.S. at 480.

119/ Id.

120/ Id. at 482 n.6.

was refined in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Under the standard, the movant must

demonstrate that the material is "needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed. . . . [Moreover], in considering the effects of disclosure of grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries."121/ Both private litigants and the Government must show particularized need.122/ If the court concludes that disclosure is warranted, it must be limited to only that material for which particularized need has been shown.123/ Further, any disclosure "may include protective limitations on the use of the disclosed material."124/ The party seeking disclosure has the burden of proof with regard to establishing particularized need.125/ The district court that determines whether there is "particularized need" is vested with substantial discretion

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121/ 441 U.S. at 222-23; see also United States v. Procter & Gamble, Co., 356 U.S. 677 (1958).

122/ United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

123/ Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 222; see also United States v. Sobotka, 623 F.2d 764, 768 (2d Cir. 1980); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla., 323 F.2d 233, 242 (5th Cir. 1963); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 845-46 (9th Cir. 1985); United States v. Liuzzo, 739 F.2d 541 (11th Cir. 1984).

124/ Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 223.

125/ Id.
in resolving the matter that should not be disturbed absent a showing of an abuse of that discretion.126/

The Supreme Court has not provided a precise definition of particularized need. In general, courts have focused on how the sought-after materials will be used. For example, disclosure may be permitted when it is sought for use in refreshing the recollection, impeaching, or testing the credibility of witnesses at trial.127/ Disclosure also has been permitted for the same purposes in deposition settings.128/ However, there is no absolute right to the grand jury testimony of a witness who later testifies in a different judicial proceeding.129/ Further, a request for disclosure for refreshing the

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126/ See In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986); In re Federal Grand Jury Proceedings, 760 F.2d 436, 439 (2d Cir. 1985); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1299 (4th Cir. 1986); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); United States v. Peters, 791 F.2d 1270 (7th Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Benson, 760 F.2d 862 (8th Cir.), cert. denied, 474 U.S. 858 (1985); United States v. Murray, 751 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 979 (1985).

127/ See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); United States v. McGowan, 423 F.2d 413 (4th Cir. 1970); Texas v. United States Steel Corp., 546 F.2d 626, 631 (5th Cir.), cert. denied, 434 U.S. 889 (1977); Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir.), cert. denied, 434 U.S. 889 (1977); United States v. Harbin, 585 F.2d 904 (8th Cir. 1978); Petrol Stops Northwest v. United States, 571 F.2d 1127, 1131 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Parker, 469 F.2d 884 (10th Cir. 1972).

128/ See Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431 (2d Cir. 1963); United States v. Fischbach and Moore Inc., 776 F.2d at 845; see also Illinois v. Sarbaugh, 552 F.2d at 776.

129/ See In re Federal Grand Jury Proceedings, 760 F.2d at 439.
recollection of a witness may be premature if it is not yet known whether the witness' recollection will, in fact, need to be refreshed.130/

Several courts have examined the need for disclosure in terms of the ability of the party seeking disclosure to obtain the requested material from some other source or by some other means.131/ Courts have also found particularized need where one party has access to grand jury material and the party seeking disclosure does not, because it would be inequitable not to allow disclosure to the other party.132/ This last factor is rarely decisive but should be given some weight in determining particularized need.

On the other hand, disclosure will not be allowed upon a mere showing of relevance nor for general discovery.133/ Convenience, avoidance of delay, the complexity of the case, the passage of time, and expense also are

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130/ See In re Grand Jury Testimony, 832 F.2d 60 (5th Cir. 1987); Illinois v. F.E. Moran, Inc., 740 F.2d 533 (7th Cir. 1984).

131/ See United States v. Moten, 582 F.2d 654 (2d Cir. 1978); In re Disclosure of Evidence, 650 F.2d 599, 601-02 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981); In re Grand Jury Proceeding (Miller Brewing Co.), 717 F.2d 1136 (7th Cir. 1983).

132/ See Dennis v. United States, 384 U.S. 855, 873 (1966); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d at 1302-03; Illinois v. Sarbaugh, 552 F.2d supra; U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir.), aff'd on

rehearing, 857 F.2d 720 (10th Cir. 1988). But see Texas v. United States Steel Corp., 546 F.2d at 630-31.

133/ See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Hernly v. United States, 832 F.2d 980 (7th Cir. 1987); Thomas v. United States, 597 F.2d 656 (8th Cir. 1979); Petrol Stops Northwest v. United States, 571 F.2d at 1129.

insufficient reasons to justify disclosure.134/ While these factors are insufficient in and of themselves, they may, nonetheless, when coupled with other factors, be used to demonstrate the requisite particularized need.

3. Particularized need must be balanced against need for maintaining grand jury secrecy

In determining whether disclosure is permitted under Rule 6(e)(3)(C)(i), the court must balance the particularized need of the party seeking disclosure against the continuing need for secrecy. As the need for secrecy declines, the burden of demonstrating need for the materials in question is reduced.135/ The burden of demonstrating that the need for disclosure outweighs the need for secrecy rests with the person seeking disclosure.136/

134/ See Smith v. United States, 423 U.S. 1303 (1975); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); United States v. Sobotka, 623 F.2d supra; In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Disclosure of

Evidence, 650 F.2d at 602; In re Holovachka, 317 F.2d 834 (7th Cir. 1963); In re Sells, 719 F.2d 985 (9th Cir. 1983); United States v. Liuzzo, 739 F.2d at 545.

135/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 949 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); United States v. Tucker, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S. 958 (1976); Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977); In re Disclosure of Testimony, 580 F.2d 281 (8th Cir. 1978); United States v. Warren, 747 F.2d 1339 (10th Cir. 1984).

136/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978).

By far the most important factor to be considered in weighing the need for continued secrecy is whether the grand jury investigation has been completed. While the grand jury investigation is pending, all of the reasons for secrecy are in full force and effect. Under these circumstances, it is virtually impossible to demonstrate sufficient need to outweigh the secrecy concerns and disclosure is virtually precluded.137/ Once the investigation is terminated and the grand jury is discharged, many of the reasons for maintaining secrecy are no longer valid and disclosure is more likely to be ordered.138/ Although the importance of secrecy may be reduced when the grand jury investigation is concluded, it is far from eliminated.139/

Generally, the most significant consideration that survives the termination of the grand jury investigation is that secrecy encourages

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137/ See United States v. Moten, 582 F.2d at 662-63; United States v. Colonial Chevrolet Corp., 629 F.2d at 949; In re

Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501 (5th Cir. 1980); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); United States v. Clavey, 565 F.2d 111 (7th Cir. 1977), cert. denied, 439 U.S. 954 (1978); In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983).

138/ See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Sobotka, 623 F.2d at 767; United States v. Rose, 215 F.2d 617 (3d Cir. 1954); United States v. Colonial Chevrolet Corp., 629 F.2d at 950; In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d supra; Wisconsin v. Schaffer, 565 F.2d 961 (7th Cir. 1977); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978); Petrol Stops Northwest v. United States, 571 F.2d supra.

139/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974); In re Grand Jury Testimony, 832 F.2d 60 (5th Cir. 1987); United States v. Fischbach and Moore Inc., 776 F.2d 839, 844 (9th Cir. 1985).

witnesses to testify fully and honestly without fear of retribution. This consideration should be given significant weight regardless of the status of the investigation.140/ This consideration may be limited, though not eliminated, by a showing that the requested information already has been disclosed to a witness' corporate employer, as will often be the case during discovery in a criminal proceeding. This is particularly true when the disclosed information has been shared with the employer's co-defendants.141/ This consideration may also be limited by a witness' consent to disclosure; however, this factor alone may not be dispositive.142/

Another factor to be considered in balancing the need for secrecy against the need for disclosure is the type of information that is at issue. For example, there are fewer secrecy concerns raised by the disclosure of subpoenaed documents than by the disclosure of grand jury transcripts.143/

140/ See United States v. Sobotka, 623 F.2d at 767; Illinois v. Sarbaugh, 552 F.2d at 775; Petrol Stops Northwest v. United States, 571 F.2d 1127, 1128-29 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

141/ See Illinois v. Sarbaugh, 552 F.2d at 775; U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965).

142/ See Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); Illinois v. F.E. Moran, Inc., 740 F.2d 533 (7th Cir. 1984).

143/ See In re Grand Jury Proceeding (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983); In re Barker, 741 F.2d 250 (9th Cir. 1984).

Other factors that decrease the need for secrecy include a public airing of the information at trial and the passage of time.144/ Factors that increase the need for secrecy include the acquittal of certain defendants and the possibility of further criminal trials.145/

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), is illustrative of the balancing approach used to determine particularized need. The court held that the State of Illinois' need for the grand jury transcripts in a private treble damage antitrust action outweighed the need for secrecy and permitted disclosure of the transcripts. The secrecy concerns had been dissipated by the termination of the grand jury investigation and the disclosure of the transcripts to defendants during criminal discovery. The diminished secrecy concerns were outweighed by the State of Illinois' need for the

documents to refresh the recollection and to impeach the credibility of witnesses at trial. In addition, fairness favored disclosure since the defendants in the private action already had copies of the transcripts from the prior criminal case discovery.

144/ See In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986).

145/ See United States v. Fischbach and Moore Inc., 776 F.2d at 844.

4. Disclosure to Government agencies

Courts have recognized that the need for secrecy is less where disclosure is sought by a public body for a public purpose; however, this reduced secrecy does not create a per se particularized need.146/ In United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), the Court held not only that Rule 6(e)(3)(C)(i) governs disclosure of materials to Government attorneys for civil purposes but, further, that the Government must show particularized need. However, the Court acknowledged that the particularized need standard "accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case".147/ Such considerations include: 1) the public

interest served by disclosure to the Government; 2) the reduced risk of further disclosure or improper use posed by disclosure to Government attorneys as opposed to private parties or the general public; 3) the burden and cost of duplicating an extensive grand jury investigation; and 4) any independent legitimate rights that the Government may have to the materials.148/

146/ See United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980); In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Disclosure of Evidence, 650 F.2d 599 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978).

147/ 463 U.S. at 445.

148/ Id. at 445-46; see also United States v. John Doe, Inc. I, 481 U.S. 102 (1987); In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986); In re Grand Jury Proceeding (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

A case that is illustrative of the balancing approach used to determine particularized need when the Government is the party seeking disclosure is In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1239 (4th Cir. 1986). In that case, the Civil Division of the Department of Justice was seeking access to grand jury material concerning a Government contractor for use in a civil proceeding against the contractor. The court found that the need for secrecy had been greatly reduced because the grand jury had been terminated for four years, the resulting criminal proceeding had been concluded by

a jury verdict following a full airing of the entire controversy, the defendant in both the criminal and civil proceedings had had unlimited possession of the grand jury material for about eight years, no witness had come forward to protest disclosure and there was less risk of further improper disclosure or improper use by disclosure to the Government. Balanced against the minimal need for secrecy was the Government's need for the grand jury materials to put it on equal terms with the civil defendant which had had access to the materials for eight years and the lapse of a substantial amount of time which had necessarily dimmed the memories of potential witnesses. Under these circumstances, the court held that disclosure to the Civil Division was entirely appropriate.

5. Disclosure to State Attorneys General

a. For civil enforcement purposes

State Attorneys General seeking access to grand jury material under section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), are not relieved of the burden of demonstrating particularized need. In Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983), the Supreme Court held that the state must show particularized need despite the language of section 4F(b). The Court's decision was based primarily on the legislative history of section 4F(b) and the importance and deep-rooted

tradition of grand jury secrecy. The Court required an affirmative expression from Congress before adopting any exception to Rule 6(e). However, the Court did emphasize that the particularized need standard had sufficient flexibility to take into account any public interest served by disclosure to a governmental body.

b. For criminal enforcement purposes

Subdivision 6(e)(3)(C)(iv), effective August 1, 1985, now permits disclosure otherwise prohibited by Rule 6(e):

> When permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

It is the intent of the amended rule and the policy of the Department to share grand jury information to assist states in the enforcement of state criminal law whenever it is appropriate to do so. While there is no requirement for a state to demonstrate a particularized need for the grand jury information, there should be a substantial need. The Assistant Attorney

General of the Division having jurisdiction over the matter that was before the grand jury, has decisional authority for applying to the court for a disclosure order. Requests from Division staff attorneys should be directed to the Assistant Attorney General through the Director of Operations. A copy of this request should be sent to each investigative agency involved in the grand jury investigation. The Department has suggested the information that should be included in a request for authorization and the factors that should be considered by the Assistant Attorney General in making a decision to seek disclosure.149/

The Division usually will oppose disclosure of grand jury material to a state attorney general while an investigation is pending but usually will request disclosure once an investigation has closed. If authorization to seek a disclosure order is granted, the proposed order must include a

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149/ See December 9, 1985 memorandum from Stephen S. Trott, then Assistant Attorney General, Criminal Division.

provision that further disclosures be limited to those required in the enforcement of state criminal laws. If the motion for disclosure is denied, a copy of the order denying the motion must be sent to the Assistant Attorney General who authorized the filing of the motion.150/

6. Mechanics of obtaining disclosure orders

Rule 6(e)(3)(D) and 6(e)(3)(E) govern the mechanics of seeking and obtaining disclosure orders under Rule 6(e)(3)(C)(i). These rules provide that:

> (D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

150/ For a more complete discussion of Division policies and procedures in this area, see ATD Manual, Ch. VII-18.

> (E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is

transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

These rules adopt the procedure suggested by the Supreme Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), for resolving venue where disclosure is sought for use in a judicial proceeding instituted in a different district from that in which the grand jury sat.151/ The procedure requires the party seeking disclosure to file a motion for disclosure in the district where the grand jury sat (the grand jury court). Next, the grand jury court must determine the need for continued secrecy. Where the need for continued secrecy remains high, for example, when the grand jury investigation is still active, the grand jury court may decide that disclosure is inappropriate, regardless of need, and

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151/ See also Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d 1293 (5th Cir.), cert. denied, 437 U.S. 905 (1978); Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977).

deny the motion. If the grand jury court decides that disclosure may be appropriate, the grand jury court should transfer the requested materials with a statement evaluating the need for continued secrecy to the court where the civil proceeding is located (the civil court). Finally, the civil court should determine particularized need and balance it against the need for

continued secrecy as stated by the grand jury court.

Where the person seeking disclosure is not the Government, Rules 6(e)(3)(D) and (E) also require notice to and the opportunity to be heard for the attorney for the Government, the parties to the judicial proceeding and such other parties as the court may direct. The Notes of the Advisory Committee for the Federal Rules of Criminal Procedure indicate that the last clause should include all persons who might suffer substantial injury from disclosure.152/ If the party seeking disclosure is the Government, then the proceeding may be ex parte, although the courts have the discretion to conduct adversary hearings.153/ Division attorneys should ordinarily file Rule 6(e)(3)(C)(i) motions ex parte whenever a public filing would result in a breach of grand jury secrecy.

Under Rule 6(e)(5), hearings on motions for disclosure should be closed to the public. This is necessary to prevent the disclosure of any grand jury information that may be discussed at the hearing.

152/ See also Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

153/ See In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), rev'd on other grounds sub nom. United States v. John Doe, Inc., 481 U.S. 102 (1987); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982).

The law on whether disclosure orders are appealable is unclear. Generally, while the grand jury is sitting, an order denying disclosure is not appealable because of the potential disruptions that would occur.154/ A writ of mandamus may be

available to review an order denying disclosure in certain extraordinary circumstances, but such review is rare.155/ The grant or denial of a disclosure order also may be appealable if the disclosure motion is the only matter pending before the federal court and appellate review otherwise might be lost,156/ or if the controversy over disclosure arose in an independent, plenary proceeding.157/ Finally, most courts have held that orders transferring grand jury materials from the court where the grand jury sat to a court that is conducting subsequent proceedings are not appealable.158/ Courts differ, however, on whether an order by a court

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154/ See In re Grand Jury Proceedings, 580 F.2d 13, 15 (1st Cir. 1978).

155/ See United States v. Weinstein, 511 F.2d 622, 624 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); In re Moore, 776 F.2d 136 (7th Cir. 1985).

156/ See United States v. Sobotka, 623 F.2d 764, 766 (2d Cir. 1980).

157/ See Baker v. United States Steel Corp., 492 F.2d 1074, 1077-78 (2d Cir. 1974) (dictum); In re Grand Jury Investigation, 630 F.2d 996, 999 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d at 1300 (dictum); Illinois v. Sarbaugh, 552 F.2d at 773.

158/ See Baker v. United States Steel Corp., 492 F.2d at 1077-78; In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d at 1300. But see In re Grand Jury Proceedings (Alpha Portland Indus. Inc.), 649 F.2d 387, 388 (6th Cir.), cert. dismissed, 453 U.S. 946 (1981).

conducting a subsequent civil proceeding permitting disclosure is appealable.159/

I. Use of Materials in Investigation

1. Quotation of transcripts in motions and briefs

It is often necessary to quote from transcripts in motions and briefs. Although staff attorneys should keep this to a minimum, it may be unavoidable, for example, when defending against a claim of prosecutorial abuse.

Precautions should be taken when filing motions and briefs that contain Rule 6(e) material. Attorneys should consider filing a motion requesting the court to place the document -- or, at a minimum, the portion with not previously disclosed Rule 6(e) material -- under seal. A frequently followed practice is to place all of the Rule 6(e) material in a separate memorandum for the court only, advising defense counsel of the filing but not providing them with a copy of the memorandum.

The most commonly applied rule regarding the appropriateness of an in camera submission is contained in In re Taylor, 567 F.2d 1183 (2d Cir. 1977), at 1188:

159/ See Baker v. United Steel Corp., 492 F.2d at 1077-78 (order for disclosure was nonappealable); Illinois v. F.E.

Moran, Inc., 740 F.2d 533 (7th Cir. 1984) (disclosure order in subsequent civil case is appealable if appeal will not delay criminal proceeding); United States v. Fischbach and Moore, Inc., 776 F.2d 839 (9th Cir. 1985) (order for disclosure is appealable).

> In order to determine, therefore, whether the in camera proceeding conducted by the district court afforded appellant all of the process to which he was entitled, the nature of the Government interest must be balanced against the private interests that are affected by the court's action.160/

If the party objecting to the in camera submission is the target of an ongoing investigation, then the balance should always be weighed in favor of the Government.161/

2. Using subpoenaed documents to refresh recollection

The documents subpoenaed by the grand jury can be very useful in refreshing a witness' recollection. Documents such as telephone records, pricing sheets, correspondence and memoranda can help a cooperative witness recall specific details and place events in a proper time sequence. Similarly, confronting a recalcitrant witness with hard documentary evidence may prod the witness to remember, or at least admit to, things he might otherwise not recall or deny.

160/ See also In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982); In re Antitrust Grand Jury, 805 F.2d 155, 161-62 (6th Cir. 1986); In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980).

161/ In re Antitrust Grand Jury, 805 F.2d at 162.

The disclosure of subpoenaed documents raises concerns involving the secrecy requirements of Rule 6(e) and, to a lesser extent, the proprietary nature of some company documents. As a threshold matter, staff should consult the local rules, the case law, and the U.S. Attorney's office in the jurisdiction where the grand jury is sitting to determine whether subpoenaed documents are considered "matters occurring before the grand jury". As previously noted, this is an area in which the courts differ widely.162/

As a practical matter, most jurisdictions will neither explicitly allow nor prohibit the disclosure of subpoenaed documents to witnesses. While the general rule is that individual documents subpoenaed by the grand jury do not constitute "matters occurring before the grand jury," disclosure of a large number of documents could reveal the scope or direction of the grand jury and, thus, implicate one of the secrecy concerns of the rule.

a. Inside grand jury room

Attorneys often disclose subpoenaed documents to grand jury witnesses during the course of their appearances

to refresh recollection and elicit more detailed and accurate testimony. Documents can pin down the dates and times of contacts, the attendance at meetings, the movement of prices over time and -- in the case of some correspondence and memoranda -- the substance of conversations. Disclosure of documents for these purposes is

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162/ See § B.2., supra for a discussion of the treatment of subpoenaed documents under Rule 6(e).

consistent with the grand jury's obligation to elicit information and examine "every clue" to determine if a crime has been committed.163/

In the course of a witness' grand jury testimony, many attorneys take the opportunity to authenticate and lay a foundation for a subpoenaed document if it is considered likely to become a trial exhibit. This has been found helpful in: (l) obtaining stipulations to the document's authenticity at trial; (2) identifying at an early stage a problem in establishing the document's authenticity; and (3) locking a witness into a line of testimony concerning the exhibit for trial. Particular care should be taken if the witness might not be available, because of identification with a target, for interviews in a post-indictment context. However, because document authentication may be time-consuming, it should be done only with important documents and care must be taken not to waste precious grand jury time or unnecessarily bore grand jurors.

One issue arising in this context is whether documents subpoenaed from a company other than the witness' employer may be shown to a witness.164/ As an initial matter, local practice and the law in the district where the grand jury is

sitting must be checked. Assuming that the practice is not prohibited, it may be very helpful to disclose such documents on occasion to prod a witness' memory and help elicit a more

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163/ Blair v. United States, 250 U.S. 273, 282 (1919); Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

164/ See § E.4., supra, for a discussion of disclosure to a witness of documents subpoenaed from another party.

detailed account of pertinent events. As with the disclosure of other documents, this disclosure is consistent with and, indeed, necessary for the grand jury to discharge its obligation to investigate fully and ferret out all pertinent facts. Care must be taken not to disclose needlessly the proprietary information from one company to the representative of another and to be aware of any other legal restrictions that may govern disclosure.165/

It is important that an accurate record be made whenever subpoenaed documents are disclosed to a witness in the grand jury room. The document should be clearly identified and, when appropriate, marked as a grand jury exhibit. This will help produce a clearer transcript and may protect against charges of impropriety and unauthorized disclosure in the future.

b. Outside the grand jury room

There is often not enough grand jury time to show a witness all pertinent documents in the grand jury room.

Sometimes, with a cooperating witness, staff would like the witness to examine the documents at his leisure so that he has ample time to fully supplement his memory and piece together a detailed and chronological account of what occurred. This ensures maximum accuracy and orderly testimony. In these instances, showing the witness documents during an interview outside the grand jury room is most helpful and appropriate.

165/ See, e.g., Right to Financial Privacy Act, 12 U.S.C. § 3420.

There is little problem in showing a witness his own company's documents outside the grand jury room. The question becomes more difficult in the case of a former employee who, for example, authored the documents, or a third-party witness. In these situations, great care must be taken to safeguard the proprietary nature of the documents.

Various safeguards have been adopted in connection with the disclosure of documents to a third-party witness. For example, some attorneys do not reveal the source of the document (i.e., which company produced it to the grand jury), showing the witness a copy with all identifying codes removed. Other attorneys have entered into confidentiality agreements pertaining to the Government's use of the documents with subpoenaed parties. Such agreements contain language to the effect that the Government would reveal the company's documents during interviews only as necessary to conduct the investigation. The company thus implicitly approves reasonable disclosure of their documents to third parties.

Finally, some courts and the U.S. Attorneys' offices have approved the practice of using an agent to review subpoenaed documents outside the presence of the grand jury. The agent then presents a summary, analysis or explanation of the documents to the grand jury.166/ This procedure usually involves expert witnesses, such as Treasury or FBI agents or economists.

166/ See In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1957).

3. Using grand jury testimony to refresh recollection

Disclosing an individual's own prior testimony to a grand jury witness may be useful when he is testifying before the grand jury for a second time (either to recant and correct prior testimony or to provide additional information) or in the course of preparing him as a witness for trial. Occasionally, an attorney may consider revealing the substance of one witness' testimony to another in the hope of eliciting truthful testimony. However, the attorney should be careful not to reveal any information that would identify the prior witness.

a. During grand jury session

It is often necessary for a witness to appear a second time before the grand jury. The witness may have been untruthful during his first appearance and wish to recant or it may be useful to expand on his initial testimony. In both cases, it is common for the witness (or his counsel) to seek access to the transcript of the witness' testimony. In most jurisdictions, the witness is not entitled to automatic access to his transcript.167/ In these jurisdictions, a Rule 6(e) order must be obtained to allow disclosure of the transcript to the witness and his counsel.168/

167/ See §§ E.1. and E.2., supra concerning the witness' right of access to his own transcript and the Division's policy regarding such disclosure.

Sometimes, in seeking to refresh recollection or confront a witness with contradictory information, staff may consider revealing the statements of or information provided by one witness to another. Opinions differ as to the efficacy of such disclosure in eliciting a witness' truthful testimony. Some attorneys do not find it useful and, instead, focus upon making as detailed a record as possible to preserve a possible perjury charge. Others think that some disclosure could prod a witness to change his testimony or remember something he might otherwise "not recall." In these circumstances, most agree that little of the other evidence should be revealed, for tactical reasons as well as Rule 6(e) concerns. Most attorneys reveal only that the grand jury has heard contradictory evidence. Again, care should be taken not to reveal any information that

would disclose the identities of prior witnesses.

b. Preparation for trial

Most attorneys find it very helpful to allow a prospective trial witness to see his grand jury testimony when preparing for trial. This often requires a Rule 6(e) disclosure order that should be obtained early in the pretrial stage. The order typically provides that the witness may be

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168/ See § H., supra. Attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's Office as to whether a 6(e) order is necessary if the transcript is disclosed to the witness alone.

provided a copy of his transcript which he may show his counsel, but that no copies or other disclosure may be made. The copy of the transcript must be returned at the conclusion of the trial. In some jurisdictions, a witness may read the transcript of his grand jury testimony without a Rule 6(e) order.169/ In any case, the transcript provided to the witness should contain only his testimony, with all colloquy between Government attorneys and grand jurors removed.

J. Disclosure to Computer Specialists

Lengthy criminal investigations that involve large volumes of testimony and documents often require the assistance of computer specialists (e.g., computer programmers, document coders and transcript keyers) to organize the accumulated information. When disclosing grand jury information to computer specialists, attorneys should be sure to file the requisite notices or to seek the appropriate orders.

If the computer specialist is a Federal Government employee, then no court order is necessary because disclosure falls within Rule 6(e)(3)(A)(ii).170/ A notice of disclosure should be filed with the court under Rule 6(e)(3)(B).

169/ See United States v. Garcia, 420 F.2d 309 (2d Cir. 1970).

170/ See § D., supra.

The computer specialists used by the Division usually are employed by private contractors. There is some authority for treating private contractors the same as permanently employed Government personnel under Rule 6(e)(3)(A)(ii).171/ Nonetheless, attorneys should check with the U.S. Attorneys Office for the district in which the grand jury is sitting and follow the practice used by that office. The practice followed by most U.S. Attorneys Offices is to seek a court order under Rule 6(e)(3)(C)(i).172/ Samples of the necessary pleadings, including affidavits, memoranda in support of motions, and proposed orders, may be obtained from the Division's Information System Support Group. Also included in

this package is the confidentiality agreement entered into between the Division and the private contractor. This agreement should be included in the papers filed with the court to demonstrate that the secrecy of the grand jury will not be breached significantly by disclosure.

K. Non-Disclosure Orders

1. Restrictions on witnesses

Witnesses may not be put under any obligation of secrecy because Rule 6(e) specifically prohibits any obligation of secrecy from being "imposed on

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171/ See United States v. Lartey, 716 F.2d 955 (2d Cir. 1983).

172/ See § H., supra.

any person except in accordance with this rule."173/ Consequently, witnesses are free to discuss their testimony with their own counsel, counsel for potential targets or anyone else they so choose. In appropriate circumstances, the grand jury foreman or the Government attorney may request that a witness not make any unnecessary disclosures because of possible

interference with the investigation. However, when making such a request, it should be extremely clear that it is a request only and not a command and that the person making the request uses no express or implied coercion.

2. Protective orders

The court may regulate the disclosure of materials turned over under court order to limit to the maximum extent possible the invasion of grand jury secrecy.174/ The nature and scope of the protective order will vary depending upon the circumstances of a given case. Generally, the greater the need for secrecy and the greater the risks of subsequent disclosure, the more stringent the protective order.

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), illustrates a particularly comprehensive protective order. The court permitted the disclosure of grand jury transcripts to the State of Illinois but required the deletion of all transcript portions that were

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173/ See § A. 5., supra.

174/ See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

irrelevant to the State's case. Secondly, the court permitted use of the transcripts in the pending litigation only and then only for

impeaching the credibility of witnesses, refreshing their recollection, or discrediting them. Finally, the court permitted disclosure to a single attorney, required that attorney to keep a log of all subsequent disclosures, prohibited the copying of the transcripts and required the return of the transcripts once they were no longer needed.

L. Sanctions

Rule 6(e)(2) provides that a "knowing violation of Rule 6 may be punished as a contempt of court." Thus, the court with appropriate jurisdiction may issue a contempt citation against a Government attorney who knowingly discloses or uses information in violation of Rule 6(e).175/ However, contempt is a severe sanction and Division attorneys should argue that lesser sanctions, if any, would be appropriate to remedy improper disclosures. For example, attorneys who have improperly used Rule 6(e) materials for civil law enforcement purposes may argue that the appropriate remedy is a prohibition against continued disclosure or use176/ or an order permitting disclosure of the Rule 6(e) materials to the opposing party.

175/ In re Grand Jury Investigation (Lance), 610 F.2d 202, 219 (5th Cir. 1980). One court has held that a Rule 6(e)

violation is punishable only as a criminal contempt and may be enforced only by the court or United States Attorney, a defendant having no private right of action. In re Grand Jury Investigation, 784 F. Supp. 1188 (E.D. Mich. 1990).

176/ See In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985).

Defendants may argue more onerous sanctions such as exclusion of the improperly obtained evidence in the civil suit for which it was used, substitution of attorneys, quashing outstanding subpoenas that are based on the improperly obtained evidence or dismissal of the criminal indictment, civil case, or both.177/ Courts are unlikely to order such drastic remedies.

There should be no suppression of evidence if a Government employee acted in good-faith reliance on a facially valid Rule 6(e) order.178/ Further, a subpoena should be quashed only when there is a flagrant abuse of Rule 6(e).179/

A remedy as drastic as dismissal of an indictment is clearly unwarranted, particularly when the violation of Rule 6(e) is inadvertent. As stated in United States v. Rosenfield, 780 F.2d 10, 11 (3d Cir. 1985), cert. denied, 478 U.S. 1004 (1986):

> An abuse of the grand jury by the prosecution merits dismissal of an indictment only where the defendant is actually prejudiced, or "(t)here is evidence that the challenged activity was something other than an isolated incident, unmotivated by sinister ends or that the

177/ See Barry v. United States, 865 F.2d 1317 (D.C. Cir. 1989).

178/ See Graham v. C.I.R., 770 F.2d 381 (3d Cir. 1985); United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987).

179/ See Gluck v. United States, 771 F.2d 750 (3d Cir. 1985).
type of misconduct has become 'entrenched and flagrant' in the circuit." (citations omitted)180/

M. Security of Grand Jury Information

Antitrust Division employees should be aware of the requirements for handling grand jury information contained in DOJ Order 2600.4 (Safeguarding Grand Jury Information) and Security Awareness Memorandum No.4 (October 26, 1981).181/ Employees working with grand jury information must exercise special precautions when using, storing, transferring and/or destroying such material.

1. Safeguards during use

When grand jury information is being used by Antitrust Division employees, it should be kept under constant observation by an authorized person who is in a position to exercise direct physical control over it. The material should be

covered, turned face down, placed in storage containers, or otherwise protected when persons who should not have access

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180/ See also In re Grand Jury Investigation (Lance), 610 F.2d supra; United States v. Stone, 633 F.2d 1272 (9th Cir. 1979); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir.), aff'd on rehearing, 857 F.2d 720 (10th Cir. 1988); United States v. Kabbaby, 672 F.2d 857, 863 (11th Cir. 1982).

181/ Failure to follow these internal regulations should not result in any sanctions against the Government.

are present. As soon as practical after use, the material should be returned to storage containers.

2. Storage requirements

Grand jury information should be stored in a lockbar file cabinet, secured with a GSA approved combination lock or its equivalent. Documents subpoenaed by the grand jury do not need to be stored in lockbar file cabinets, but should be stored in rooms with secure door locks. Entrances and exits to rooms where grand jury information or subpoenaed grand jury documents are stored must be locked during nonworking hours, or when no authorized individual is present, to insure security of the material.

3. Safeguards during transfer

When grand jury information cannot be personally transmitted by an authorized Department of Justice employee, it should be transferred by U.S. Postal Service certified mail with return receipt. Documents subpoenaed by the grand jury can be transferred by mail or by a private courier service or mover hired by the General Services Unit of the Antitrust Division's Executive Office.

4. Return and destruction procedures

When grand jury information is no longer needed, it shall be treated in accordance with the requirements of ATR Directive 2710.1 (Procedures For Handling Division Documents). Documents subpoenaed by the grand jury should be returned to their owner when no longer needed. If the owner does not wish them returned, they should be destroyed by burning, shredding, or pulping. Other material that may contain grand jury information that is inappropriate for permanent retention, such as copies, working papers or typewriter ribbons, should be destroyed in the same manner as grand jury information. Magnetic tapes containing grand jury information (such as computer or dictation tapes) must be erased electromagnetically before they are reused or destroyed.

5. Safeguards for word processing equipment

To protect against unauthorized access, all documents containing grand jury information that are stored in a word processing system should be password protected.